84-1879

Office-Supreme Court, U.S.
FILED
MAY 31 1985
ALEXANDER L. STEVAS,
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NO. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF SUGAR LAND AND WALTER WOLF,
*Petitioners*

v.

SIGNAD, INC.,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly applied the *Colorado River* abstention doctrine to the facts in this case.

2. Whether a Federal Court should abstain in a case before it in which the cause of action asserted is a compulsory counterclaim to a pending state court suit.

# TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | 1 |
| TABLE OF CONTENTS | II |
| TABLE OF AUTHORITIES | III |
| STYLE OF CASE | 1 |
| OPINIONS IN COURTS BELOW | 1 |
| STATEMENT OF JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| ARGUMENT AND AUTHORITIES | 8 |
| CONCLUSION | 27 |
| CERTIFICATE OF SERVICE | 29 |
| APPENDIX A—DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT | 1a |
| APPENDIX B—ORDER SIGNED BY THE HONORABLE JUDGE ROBERT O'CONOR, JR. GRANTING MOTION TO DISMISS | 6a |
| APPENDIX C—JUDGMENT IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT | 8a |
| APPENDIX D—ORDER DENYING PETITION FOR REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT | 10a |

# TABLE OF AUTHORITIES

CASES — Page

*Aetna State Bank v. Altheimer*, 430 F.2d 750 (7th Cir. 1970) ..... 19
*Askew v. Hargrave*, 401 U.S. 476 (1971) ..... 18
*Bailey v. Travis*, 622 S.W.2d 143 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.) ..... 24
*Bell v. Bell*, 411 F. Supp. 716 (D.C. Wash. 1976) ..... 17
*Booth v. Chadwick*, 154 S.W.2d 268 (Tex. Civ. App.—Galveston 1941, writ ref'd) ..... 24
*Brillhart v. Excess Insurance Co.*, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942) ..... 11
*Chintala v. Diamond Reo Trucks, Inc.*, 393 F. Supp. 1392 (E.D. Pa. 1975) ..... 19
*Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) .....8, 9, 10, 11, 12, 13, 15, 16, 17, 19, 22, 27
*Columbia Plaza Corp. v. Security National Bank*, 525 F.2d 620 (D.C. Cir. 1975) ..... 26
*Cunningham v. Ford Motor Co.*, 413 F. Supp. 1101 (D.S.C. 1976) ..... 9
*Donnkenny, Inc. v. Nadler*, 544 F. Supp. 166 (S.D.N.Y. 1982) ..... 26
*Donovan v. City of Dallas*, 377 U.S. 408, 84 S.Ct. 1582, 12 L.Ed.2d (1964) ..... 11
*Flato Brothers, Inc. v. Builders Loan Company of Dallas*, 457 S.W.2d 154 (Tex. Civ. App.—Dallas 1970, no writ) 26
*Gray v. Kirkland*, 550 S.W.2d 410 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) ..... 24
*Gresham Park Community Organization v. Howell*, 652 F.2d 1227 (5th Cir. 1981) ..... 18
*Griffin v. Holiday Inns of America*, 496 S.W.2d 535 (Tex. 1973) ..... 24, 25
*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) ..... 11
*Kelser v. Anne Arundel County Department of Social Services*, 679 F.2d 1092 (4th Cir. 1982) ..... 18
*Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 72 S.Ct. 219, 96 L.Ed. 200 (1952) ..... 9
*Miller v. Carr*, 535 F. Supp. 682 (W.D. Wash. 1982) .. .....16, 17, 19, 21, 22
*Monroe v. Pape*, 365 U.S. 167 (1961) ..... 21
*Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) .....8, 10, 12, 13
*North v. Budig*, 637 F.2d 246 (4th Cir. 1981) ..... 18

CASES


| | Page |
|---|---|
| *Pacific Livestock Co. v. Lewis*, 241 U.S. 440, 36 S.Ct. 637, 60 L.Ed. 1084 (1916) | 11 |
| *Peterson v. United Accounts, Inc.*, 638 F.2d 1134 (8th Cir. 1981) | 26 |
| *Price v. Couch*, 462 S.W.2d 556 (Tex. 1970) | 24 |
| *Princess Lida v. Thompson*, 305 U.S. 456, 59 S.Ct. 275, 83 L.Ed. 285 (1939) | 11 |
| *Ranch Association v. California Coastal Zone Conservation Commission*, 396 F. Supp. 533 (D.C. Cal. 1975) *remanded on other grounds*, 537 F.2d 1058 (9th Cir. 1976) | 17 |
| *Reetz v. Bozanich*, 397 U.S. 82 (1970) | 18 |
| *Revere Copper and Brass, Inc. v. Aetna Casualty and Surety Co.*, 426 F.2d 709 (5th Cir. 1970) | 24 |
| *Simmons v. Wetherell*, 472 F.2d 509 (2d Cir.), *cert. denied*, 412 U.S. 940 (1973) | 18 |
| *Sisler v. West*, 570 F. Supp. 1 (S.D. Iowa 1983) | 17, 18, 19 |
| *Surowitz v. New York City Employees Retirement System*, 376 F. Supp. 369 (D.C.N.Y. 1974) | 18 |
| *Western Food Plant, Inc. v. MacFarlane*, 588 F.2d 778 (10th Cir. 1978) | 18 |
| *Western Inn Corporation v. Heyl*, 452 S.W.2d 752 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.) | 25 |


UNITED STATES CONSTITUTION


| | |
|---|---|
| Fifth Amendment | 7, 20 |
| Fourteenth Amendment | 20 |


UNITED STATES STATUTES


| | |
|---|---|
| 28 U.S.C. § 1254(1) | 2 |
| 28 U.S.C. § 1331 | 7 |
| 28 U.S.C. § 1343(a)(3) | 7 |
| 28 U.S.C. § 1345 | 10 |
| 42 U.S.C. § 1983 | 7, 8, 16, 17, 18, 19, 20, 22, 25 |


UNITED STATES ARBITRATION ACT


| | |
|---|---|
| Section 4 | 12 |


TEXAS RULES OF CIVIL PROCEDURE


| | |
|---|---|
| Rule 97 | 2, 23 |
| Rule 97(a) | 2, 23, 24, 26 |


TEXTS


| | |
|---|---|
| B. McElroy, *Texas Practice* § 1204 (1980) | 23 |
| Wright & Miller, *Federal Practice and Procedure* § 1418 | 26 |
| Wright & Miller, *Federal Practice and Procedure* § 4247 | 9, 10 |

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v.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

*To the Honorable The Supreme Court of the United States:*

The City of Sugar Land and Walter Wolf, Petitioners herein, present their Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and respectfully present as follows:

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A attached hereto) is reported at 753 F.2d 1338 (5th Cir. 1985).

No opinion was written by the District Court. A copy of the District Court's Order dismissing the Respondent's suit is attached hereto as Appendix B.

## STATEMENT OF GROUNDS OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was signed and entered on February 28, 1985. The United States Court of Appeals for the Fifth Circuit denied Petitioners' Petition for Rehearing on April 10, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Rule 97, Texas Rules of Civil Procedure, sets forth the rule regarding compulsory counterclaims in the State of Texas. Rule 97(a) states:

> (a) Compulsory Counterclaims.
>
> A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . .

## STATEMENT OF THE CASE

### A. Statement of Facts

In December, 1977, the City of Sugar Land adopted its Ordinance No. 239. This ordinance concerned the

erection and installation of signs and billboards and required permits for their construction. In September, 1980, the City of Sugar Land passed Ordinance No. 340 which, among other things, prohibited off-premises signs and set forth an abatement procedure whereby, depending upon the value of the sign, a period for removal was granted (up to four years) for non-conforming and non-permitted signs. All off-premises signs, regardless of value, had to be removed by four years from the date of the ordinance.

Ordinance No. 239, in Section 17-28 provides:

> "Any billboard or sign which may become rotten or in any manner detrimental to the public health, morals, decency, safety or general welfare of the people of the city and any billboard which shall be erected, constructed or maintained contrary to the provisions of this article may be condemned and ordered removed. In addition to the authority conferred upon the city to remove the same on determination by the building inspector, any person who shall maintain or permit to be maintained any billboard or advertising sign which is in a rotten or unsafe condition, or which has been erected, constructed or maintained contrary to the provisions of this article shall be guilty of an offense."

By letter dated October 16, 1980, after Ordinance No. 340 was passed and approved, the City of Sugar Land notified Southern Pacific Transportation Company that the signs along its right-of-way in the city were non-conforming and because SignAd, Inc. ("SignAd") had signs located along the Southern Pacific right-of-way, Southern Pacific notified SignAd of the non-conforming signs by letter dated October 23, 1980. On October 30, 1980, SignAd wrote to Mr. Lee Dozier, former city engineer

of the City of Sugar Land and notified him of the fact that SignAd had three (3) billboards in Sugar Land, all on the Southern Pacific right-of-way along Highway 90-A. In the letter, the three signs were designated "No. 1, No. 2 and No. 3" and each sign was described by the advertising appearing on the sign and the position of the sign on Highway 90-A. The October 30, 1980 letter further stated that the value of each sign was over $5,000 which would allow the signs to be abated over the maximum four year period. By letter dated November 18, 1980, Mr. Dozier acknowledged the SignAd letter and accepted the value declaration and the four year abatement period for the three signs. In the letter, Mr. Dozier reminded SignAd that should the signs be allowed to deteriorate they could be condemned and abated without further delay.

In August, 1983, Hurricane Alicia moved through the Gulf Coast area and damaged several of the signs located along Highway 90-A. SignAd applied for permits to repair sign numbers 1 and 2 as listed in the October 30, 1980 letter. The application for a permit to repair the signs specifically listed sign numbers 1 and 2 and the permit No. 4252 that was granted on November 10, 1983 was a permit for the repair of the signs listed as numbers 1 and 2 on the October 30, 1980 letter. No permit to repair the sign which was in dispute in the lower court (sign No. 3 in the October 30, 1980 letter) was ever applied for by SignAd or granted by the City of Sugar Land or Walter Wolf, the building inspector for the City of Sugar Land.

On December 2, 1983, Walter Wolf stopped SignAd workers at the site where workers were attempting to re-erect sign No. 3 and informed the workers that SignAd

had no permit to erect or repair a sign at this location. The workers left and Mr. Wolf attempted to contact Mr. Gilbreath of SignAd but was unsuccessful in doing so on that date. At the time Mr. Wolf stopped the workers, no new poles had been set in place. The workers were drilling the holes in which to set the poles and there was evidence of one pole remaining which had been broken off. No part of the sign which was being built had been erected at this time. On Monday, December 5, 1983, Mr. Wolf again stopped SignAd workers at the disputed site and told them there was no valid permit to make the repairs or rebuild the sign. Mr. Wolf asked the workers to have someone from their office contact him. Mr. Wolf left messages for Mr. Gilbreath to contact him and after failing to reach Mr. Gilbreath, Jr., Mr. Wolf asked for Mr. Gilbreath, Sr. and explained the problem to him; Mr. Gilbreath, Sr. advised that he would have his son contact Mr. Wolf. The SignAd workers had erected four new ground support poles which were apparently set over the weekend of December 3-4, 1983.

On December 6, 1983, Mr. Wolf spoke to Mr. Brooks with SignAd and explained the need to get the supports removed by 5:00 o'clock p.m. on December 7, 1983. On December 7, 1983, Mr. Gilbreath, Jr. notified Mr. Wolf that SignAd would not remove the supports and on December 8, 1983, Mr. Wolf directed the street department of the City of Sugar Land to remove the materials from the site and to store them on city property.

On March 20, 1984, the City of Sugar Land filed suit under cause No. 45,865 in the District Court of Fort Bend County, Texas, 240th Judicial District. This lawsuit, styled *City of Sugar Land v. SignAd, Inc.*, is still pending and is a suit for injunction, asking the court to

restrain SignAd from violating the sign ordinance and from maintaining the two billboards in question and to order SignAd to remove two billboards located in the City of Sugar Land. One of the billboards at issue in the state court suit was the billboard at issue in the federal court suit filed by SignAd, i.e., billboard No. 3 as listed in the October 30, 1980 letter.

On or about April 18, 1984, SignAd filed the suit made the basis of this appeal in the United States District Court for the Southern District of Texas, Houston Division. The lawsuit alleged that the Petitioners destroyed billboard No. 3 and unlawfully removed the repair materials from the site. The suit further alleges that the City of Sugar Land has since refused to allow it to re-erect the sign. SignAd also complains about the denial of its permit to repair the sign and claims that a permit was actually granted by the City and then revoked and that it has not received notice of such revocation or other proper notices regarding the permit's supposed revocation.

Both the state court suit which is still pending and the federal suit filed by SignAd dealt with the same billboard, i.e., billboard No. 3 as listed in the letter of October 30, 1980.

**B. Course of Proceedings and Disposition in Court Below.**

On March 20, 1984 the City of Sugar Land filed a lawsuit in the District Court of Fort Bend County, Texas, 240th Judicial District, styled *City of Sugar Land v. SignAd, Inc.*, under cause No. 45,865. The Fort Bend County suit concerned the same billboard owned by SignAd, Inc. that is at issue in the case currently on ap-

peal to this Court. In the Fort Bend County suit the City of Sugar Land alleged SignAd had continuously since December 5, 1983 violated Chapter 17 of the Code of Ordinances, "Signs and Billboards" of the City of Sugar Land by: (a) threatening to reconstruct the billboard within the city limits of Sugar Land, Texas without a permit; (b) failing to modify said billboard to conform to said provisions of said city code; and (c) failing to remove the billboard as ordered by the City of Sugar Land. In the state court suit the City of Sugar Land seeks a permanent injunction against SignAd restraining it from violating Chapter 17, Code of Ordinances of the City of Sugar Land and from operating and maintaining the billboard and also asks for a mandatory injunction for SignAd to remove the billboard.

SignAd then filed a lawsuit in the United States District Court for the Southern District of Texas, Houston Division on or about April 18, 1984, some twenty-nine (29) days after the City of Sugar Land filed its lawsuit in Fort Bend County, Texas. SignAd sued the City of Sugar Land and the building inspector Walter Wolf, individually, seeking relief under 42 U.S.C. Section 1983 and for conversion and for violation of the Fifth Amendment to the United States Constitution.

The basis for jurisdiction in the District Court was Federal question jurisdiction, 28 U.S.C. § 1331 and under 28 U.S.C. § 1343(a)(3) (civil rights). These allegations all arise from the alleged actions concerning the same billboard at issue in the Fort Bend County suit.

Petitioners filed their Original Answer and on the same day filed a "Plea in Abatement or in the Alternative Motion to Dismiss" and a Memorandum of Arguments and Authorities in support thereof.

On August 16, 1984, the Honorable Robert O'Conor, Jr. granted the Petitioners' Motion to Dismiss the federal court suit and dismissed the suit without prejudice to the refiling of the same.

The United States Court of Appeals for the Fifth Circuit reversed and remanded the case for trial on February 28, 1985.

## ARGUMENTS AND AUTHORITIES

### 1. Whether the Court of Appeals correctly applied the *Colorado River* abstention doctrine to the facts in this case.

This Honorable Court should grant Petitioners' Petition for Certiorari because the United States Court of Appeals for the Fifth Circuit misapplied the abstention doctrine as established by this Court in *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) and as later modified by this Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

The Fifth Circuit Court of Appeals, for the first time, was faced with the issue of the *Colorado River* abstention doctrine in a case where a cause of action under 42 U.S.C. § 1983 was alleged by the plaintiff in the federal court suit. The precise issue of the application of the *Colorado River* abstention doctrine in the context of a case arising under 42 U.S.C. § 1983 has not been settled by this Court.

The Fifth Circuit Court of Appeals misapplied the *Colorado River* and *Moses* factors in its decision to re-

verse the District Court which had abstained from ruling in the matter.

In the *Colorado River* case this Honorable Court held that the facts did not fall within any of the abstention categories formerly recognized. Despite this, this Court upheld the trial court's dismissal of the federal court suit in deference to the state court proceedings and stated:

> "Although this case falls within none of the abstention categories, there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. These principles rest on considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' "

424 U.S. at 817, *citing Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200, 203 (1952).

Thus, the *Colorado River* case recognized that for reasons of wise judicial administration there are certain circumstances in which a federal court action should be dismissed due to the presence of a concurrent state proceeding.

The recognition of these types of dismissals has been called by some a "fourth prong" of the abstention doctrine. *See e.g.* Wright & Miller, *Federal Practice and Procedure* § 4247; *Cunningham v. Ford Motor Co.*, 413 F. Supp. 1101, 1106 (D.S.C. 1976). The type of abstention recognized in the *Colorado River* case has been said to

be regarded as abstention to serve the convenience of the federal courts and to avoid duplicative litigation. Wright & Miller, *Federal Practice and Procedure*, § 4247.

In the *Colorado River* case, the United States brought suit on its own behalf and on behalf of two Indian tribes seeking a declaration of its rights to waters in certain rivers located in a water division in Colorado. Shortly after the federal suit was commenced, one of the defendants in that suit filed suit in state court in Colorado seeking an order directing service of process on the United States in order to make it a party to proceedings in the state court suit for the purpose of adjudicating all of the government's claims, both state and federal. The federal district court granted a motion filed on behalf of several of the defendants to dismiss the cause of action stating the doctrine of abstention required deference to the proceedings in the state court. On appeal, the Court of Appeals reversed, holding that the suit of the United States was within the district court's jurisdiction under 28 U.S.C. § 1345 and that abstention was inappropriate. The Supreme Court reversed the Court of Appeals and held that the dismissal was proper.

This Court, as above quoted, held that there were principles unrelated to considerations regarding the normal abstention doctrines which "rest on considerations of wise judicial administration" that may, in certain instances, authorize the dismissal of a federal court suit in deference to a currently pending state court action. The abstention doctrine recognized in the *Colorado River* case was reaffirmed by this Court in the case of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

The *Colorado River* case mentioned four factors to be used in determining whether this fourth prong of abstention is appropriate.

The first factor cited was that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts. *See Donovan v. City of Dallas,* 377 U.S. 408, 412, 84 S.Ct. 1582, 12 L.Ed.2d (1964); *Princess Lida v. Thompson,* 305 U.S. 456, 466, 59 S.Ct. 275, 280, 83 L.Ed. 285, 291 (1939).

The second factor that a court may consider in assessing the appropriateness of dismissal in the event of a concurrent state court proceeding as cited by the *Colorado River* case is the inconvenience of the federal forum. 424 U.S. at 818; *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).

The third factor cited in *Colorado River* is the desirability of avoiding piecemeal litigation. 424 U.S. at 818; *Brillhart v. Excess Insurance Co.,* 316 U.S. 491, 495, 62 S.Ct. 1173, 1175, 86 L.Ed. 1620, 1625 (1942).

The fourth factor to be used in determining whether abstention should apply where there is a concurrent state court proceeding is the order in which jurisdiction was obtained by the concurrent forums. 424 U.S. at 818; *Pacific Livestock Co. v. Lewis,* 241 U.S. 440, 447, 36 S.Ct. 637, 640, 60 L.Ed. 1084, 1096 (1916).

As the *Colorado River* case instructed:

> "No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise is required.

424 U.S. at 818-19.

In the *Moses H. Cone* case, this Court held that the *Colorado River* abstention doctrine was still a viable one and discussed the four factors mentioned in the *Colorado River* case as they applied to the facts at hand. The Court in *Moses H. Cone* noted that there was no assumption by either court of jurisdiction over any res or property nor any contention that the federal forum was any less convenient to the parties than the state forum. 103 S.Ct. at 939. The remaining factors—avoidance of piecemeal litigation and the order in which jurisdiction was obtained favored the retention of jurisdiction by the federal court. The determining factor in the *Moses H. Cone* case was the statute at issue.

In *Moses H. Cone,* a contractor sought arbitration under the Federal Arbitration Act of its dispute with the hospital. The District Court denied the arbitration pending a disposition of a state action wherein the hospital sought a declaratory judgment that there was no right to arbitration. After the state court action was filed, the construction company filed a diversity of citizenship action in federal district court seeking an order compelling arbitration under Section 4 of the United States Arbitration Act.

In the *Moses H. Cone* case it was decided that the District Court improperly dismissed the federal court action in view of Congress' clear intent in the Arbitration Act to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible. This Court noted that the Arbitration Act calls for an expeditious and summary action with respect to factual issues to be determined in an arbitration matter and that to stay the action pending the state court suit would inevitably result in delay.

The critical factor to this Court in the *Moses H. Cone* case was apparently the Arbitration Act and the delay which would result if the federal court suit were allowed to be stayed pending resolution of the state court action.

In addition to the factors cited in the *Colorado River* case, the *Moses H. Cone* case set forth a further reason in support of the decision—the fact that federal law provided the rule of decision on the merits in the case. Again, this is a reference to the application of Federal Arbitration Act to the case. This Court noted, however, that the source of law factor has less significance where a federal court's jurisdiction is concurrent with that of the state court. 103 S.Ct. 940 at 942.

Finally, the *Moses H. Cone* Court cited in support of its decision the inadequacy of the state court proceedings to protect the right of the plaintiff in the federal court suit. It was uncertain, in the *Moses H. Cone* case, whether the state court could even grant the order to compel arbitration under the Arbitration Act which was requested in the federal court. This Court stated:

> "[I]t suffices to say that there was, at a minimum, substantial room for doubt that Mercury [the plaintiff in the federal court suit] could obtain from the state court an order compelling the hospital to arbitrate."

103 S.Ct. at 942-43.

Application of the *Colorado River* and *Moses H. Cone* factors to the instant case yields the conclusion that the district court properly dismissed the federal court suit and that the Fifth Circuit Court of Appeals misapplied the *Colorado River* abstention factors.

The first factor cited—that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts, supports the decision to dismiss the case.

There is no question that the action in state court in Fort Bend County, Texas is a suit for a permanent injunction restraining SignAd from operating and maintaining the billboard made the subject of the suit and for a mandatory injunction ordering SignAd to remove the billboard. Thus, the state district court has jurisdiction of the billboard in the condition as it existed at the time the injunction suit was filed. The City of Sugar Land removed several support poles and 2 x 4's and other repair materials when it was discovered that the billboard was being reconstructed. This property is now being held by the City of Sugar Land. The state court, having first acquired jurisdiction over the property in dispute (the billboard repair materials) is entitled to exercise that jurisdiction to the exclusion of other courts, as the above cited cases indicate. Petitioners would show that the state court suit is not an *in personam* case but is indeed an *in rem* case over which property the state court has obtained jurisdiction. As indicated above, the state court action filed by the City of Sugar Land sought to enjoin the erection and/or repair of a billboard and subsequently the City of Sugar Land confiscated the repair materials of the billboard sought to be reconstructed. Indeed, one of SignAd's counts against the City of Sugar Land and Walter Wolf in the federal court suit is that of conversion of their property and the taking of their property without just compensation. There is property of which a court may obtain jurisdiction—the repair materials being used to reconstruct the sign and the remnants of the sign which

were to be used in its reconstruction. This is the property over which the state court has prior jurisdiction and this is the reason the first factor cited by the *Colorado River* court supports the district court's dismissal of the action. The Fifth Circuit did not even address this factor expressly cited by the *Colorado River* case as being a factor to consider in deciding whether abstention in a given case is appropriate.

The factor of inconvenience of the federal forum also supports the district court's decision. The Court of Appeals did not discuss any of the inconvenience caused to the Petitioners by the federal forum and only mentions the number of miles from the City of Sugar Land to Houston and Richmond, Texas. There are numerous other factors showing the inconvenience of the federal forum. The billboard giving rise to both the state and federal lawsuits was located along Highway 90-A in the City of Sugar Land in Fort Bend County, Texas and the materials used to begin reconstruction of the billboard are located in Sugar Land, Texas. The City of Sugar Land's administrative offices and the office of its building inspector, Walter Wolf, are located in the City of Sugar Land, Texas and the city council minutes, applications for permits and other documentation in the City of Sugar Land's possession and under its control are located in the administrative offices in Sugar Land, Texas. All of these documents and materials are relevant to the lawsuit in question and reference to them will be needed at any trial of this suit. Therefore, the federal forum in Houston, Texas is much more inconvenient than the Fort Bend County Courthouse in Richmond, Texas and therefore this factor in the *Colorado River* analysis weighs in favor of the dismissal of the federal court suit.

The next factor discussed in the *Colorado River* case is the desirability of avoiding piecemeal litigation. Clearly, at the time the trial court dismissed the federal court suit, there were two pending cases involving the same core of facts arising from the attempted reconstruction of a billboard which was destroyed by Hurricane Alicia. The City of Sugar Land's state court action was for injunctive relief to enjoin the reconstruction of the billboard which was destroyed. The federal court suit filed by SignAd followed some 29 days later and complained of the denial of a permit and the taking of the same property made the subject of the City of Sugar Land's injunction suit. To have two courts deciding these issues in a piecemeal fashion is clearly unwarranted and the second factor of the *Colorado River* analysis supports the trial court's decision to dismiss the suit without prejudice.

The Court of Appeals dismissed this factor as allowing the abstention doctrine to apply in this case by merely stating that "piecemeal litigation and some duplication of judicial effort is the unavoidable price of preserving access to the federal relief which section 1983 assures." 753 F.2d at 1340.

SignAd would not be denied the federal relief which Section 1983 assures if the action were dismissed with prejudice to the refiling of the same in the state court suit currently pending in Fort Bend County, Texas. It is clear that a state court in Texas has jurisdiction to entertain all of the causes of action set forth by SignAd in its original complaint, including the Section 1983 causes of action. *Miller v. Carr,* 535 F. Supp. 682 (W.D. Wash. 1982). As the *Miller* court pointed out: "[D]uplicative litigation is, understandably, disfavored. [S]uch litigation burdens the judicial resources of both the state and federal

courts . . . [and] is potentially prejudicial to the litigants." 535 F. Supp. at 685.

The final factor cited by the *Colorado River* Court in analyzing whether abstention is proper is the order in which the jurisdiction was obtained by the concurrent forums. As to this factor, the Court of Appeals acknowledged that the state court action was filed 29 days before the filing of the federal court suit. Thus, the state court clearly obtained prior jurisdiction. Again, the Court of Appeals in a somewhat conclusory fashion, dismissed this factor by stating that it should be applied in a flexible manner and in terms of how much progress has been made in the two actions. Admittedly, the order in which jurisdiction was obtained is not conclusive, however, it is one factor to be used in determining whether the abstention doctrine can be applied to allow a dismissal of a federal court suit. *See Colorado River Water Conservation District v. United States,* 424 U.S. at 818. The factor mentioned by the Court of Appeals, i.e., that discovery was at a more advanced stage in the federal forum than in the state litigation, does not favor the denial of abstention, as any discovery completed in the federal court suit would be applicable in any state court action filed by SignAd.

It has been held that an exception to the abstention doctrine has not been established in civil rights cases. *See Sisler v. West,* 570 F. Supp. 1 (S.D. Iowa 1983); *Bell v. Bell,* 411 F. Supp. 716, 718 (D.C. Wash. 1976); *Ranch Association v. California Coastal Zone Conservation Commission,* 396 F. Supp. 533, 537 n.5 (D.C. Cal. 1975) *remanded on other grounds,* 537 F.2d 1058 (9th Cir. 1976). It is clear that the doctrine of abstention may be appropriate in actions brought under 42 U.S.C. Sec-

tion 1983. *Sisler v. West,* 570 F. Supp. 1 (S.D. Iowa 1983); *Surowitz v. New York City Employees Retirement System,* 376 F. Supp. 369, 376-77 (D.C.N.Y. 1974); *Askew v. Hargrave,* 401 U.S. 476 (1971); *Reetz v. Bozanich,* 397 U.S. 82 (1970).

Numerous cases in the lower federal courts have either dismissed or stayed actions (including actions under Section 1983) pending in the federal courts due to a concurrent state action based on one or more of the abstention doctrines. *See e.g., Kelser v. Anne Arundel County Department of Social Services,* 679 F.2d 1092 (4th Cir. 1982) (case held district court did not abuse its discretion in abstaining from exercising jurisdiction over plaintiff's civil rights action alleging tortious conspiratorial conduct by county department and county officials); *Gresham Park Community Organization v. Howell,* 652 F.2d 1227 (5th Cir. 1981) (dismissal of suit under 42 U.S.C. Section 1983 to enjoin enforcement of a state court injunction prohibiting picketing upheld); *North v. Budig,* 637 F.2d 246 (4th Cir. 1981) (court held that the district court should have abstained from exercising jurisdiction in a suit under 42 U.S.C. Section 1983 where state proceedings were pending, the court stating: "The pendency of state proceedings is an extremely important factor in determining whether abstention by a federal court is appropriate."); *Western Food Plant, Inc. v. MacFarlane,* 588 F.2d 778 (10th Cir. 1978) (the abstention from deciding federal actions on basis that state proceedings were pending held proper in a suit for damages under 42 U.S.C. Section 1983); *Simmons v. Wetherell,* 472 F.2d 509 (2d Cir.), *cert. denied,* 412 U.S. 940 (1973) (federal action claiming that state had fenced off a part of plaintiff's land and put airport lights on it stayed pending resolution of the state's suit based on same facts);

*Aetna State Bank v. Altheimer,* 430 F.2d 750 (7th Cir. 1970) (federal court held as having discretion to stay an action pending the outcome of a state proceeding and should consider not only priority of litigation but also "the totality of the issues before the respective courts, the convenience of parties litigant, the prospect of early completion of the litigation and any other aspects which might bear upon the fairness of litigation to all concerned"); *Sisler v. West,* 570 F. Supp. 1 (S.D. Iowa 1983) (case brought under 42 U.S.C. Section 1983 dismissed under *Colorado River* abstention doctrine because of previously filed state court suit involving similar factual issues); *Chintala v. Diamond Reo Trucks, Inc.,* 393 F. Supp. 1392 (E.D. Pa. 1975) (federal district court suit stayed where all parties were presently in state court action and where discovery in each suit would be substantially the same); *Miller v. Carr,* 535 F. Supp. 682 (W.D. Wash. 1982) (dismissal of federal court action under 42 U.S.C. Section 1983 upheld where similar action pending in state court).

The *Miller* case cited above is representative of these cases and is analogous to the case at bar. The Plaintiffs in the *Miller* case sought to develop certain real property located in the City of Port Angeles, Washington. The city council of the City of Port Angeles conditioned approval of the Plaintiff's plat on Plaintiff's agreement to make certain street improvements. The Plaintiffs filed a suit in state court in Washington, seeking a judgment that the pre-conditions to the approval of the plat were violative of their constitutional rights. Additionally, the Plaintiffs sought damages for violation of an agreement between the parties relative to the development. Shortly after filing the state court action, a federal court suit

was filed, where the Plaintiffs sought declaratory relief and damages against the planning director of the City and against the city councilmen and against the City itself, alleging causes of action under 42 U.S.C. Section 1983 and a violation of the 5th and 14th Amendments to the Constitution. The facts made the basis of the allegations in the federal court suit stemmed from the fact that in April, 1978 Plaintiffs applied to the City for a preliminary plat to permit the construction of multi-family dwellings. In May, Defendant Carr, in his capacity as City Planning Director, issued a requirement that Plaintiffs prepare a detailed environmental impact statement. After this requirement was issued, Plaintiffs withdrew their application. In November, 1978 Plaintiffs again filed an application for a preliminary plat and in December, 1978 Carr initiated the environmental impact process in connection with the application and Plaintiffs proceeded to prepare an environmental impact statement. In July of 1980 the City Council approved the plat but in doing so excluded certain pre-conditions to the approval of the plat which had been recommended by the City Planning Commission. In July, 1980 the Council reconsidered its earlier decision and voted to include the previously rejected preconditions. It was these preconditions which were the basis of the Plaintiff's claims in the federal court suit.

The Defendants moved to dismiss the Complaint because of the pending state court suit arising from the same transaction. In analyzing the motion, the court first stated the well established principle that jurisdiction to entertain suits under the Civil Rights Act is *concurrent* in the state and federal courts. In fact, the court went further and stated that the federal remedy is supplemen-

tary to the state remedy and cited *Monroe v. Pape,* 365 U.S. 167 (1961) The court in *Miller* correctly concluded that there was nothing which would bar the Washington state court from resolving the Section 1983 questions at issue.

The court concluded that the actions pending before the state and federal court were essentially duplicative, although there were some differences in the amount of damages sought and in the presence of additional claims in the state court suit. The court stated the following:

> "Duplicative litigation is, understandably, disfavored. Not only does such litigation unnecessarily burden the judicial resources of both the state and federal courts, it is also potentially prejudicial to the litigants. This Court is cognizant of the rule that the pendency of an action in a state court is no bar to proceedings concerning the same matter in a federal court. *McClellan v. Carland,* 217 U.S. 268, 30 S.Ct. 501, 54 L.Ed. 762 (1910). 'It is equally well settled that a district court is under no compulsion to exercise that jurisdiction. *Brillhart v. Excess Ins. Co.,* 316 U.S. 491, 494, 62 S.Ct. 1173, 1175, 86 L.Ed. 1620 (1942), where the controversy may be settled more expeditiously in the state court.' *Will v. Calvert Fire Ins. Co.,* 437 U.S. 655, 662-63, 98 S.Ct. 2552, 2557, 57 L.Ed.2d 504 (1978). Whether to defer to the concurrent jurisdiction of a state court is a matter committed to the district court's discretion. *Id.* This is so even when matters of substantive federal law are involved. *Id.* . . . Here, the same parties are presenting the same issues to a state court. That court is fully empowered to hear the balance of Plaintiff's constitutional claims."

535 F.Supp. at 685.

The *Miller* court dismissed the Plaintiff's Complaint, stating in conclusion that "[w]ere this Court to permit every disappointed property owner to come directly into federal court under Section 1983, merely by alleging that a local land or revenue decision was unreasonable, arbitrary, or discriminatory, it would be assuming the functions of a municipal court of appeals." *Id.* at 688.

The Fifth Circuit Court of Appeals misapplied the *Colorado River* abstention factors to the case at hand and this Honorable Court should grant Petitioner's Application for Writ of Certiorari in order to settle the application of the federal abstention doctrine as established by this Court and to resolve the conflict which the Court of Appeals' opinion presents with the opinions of other Federal Courts of Appeals and the decisions of this Court.

**2. Whether a Federal Court should abstain in a case before it in which the cause of action asserted is a compulsory counterclaim to a pending state court suit.**

The Fifth Circuit Court of Appeals' decision does not discuss the argument of Petitioners that the district court was correct in dismissing SignAd's federal court suit because the causes of action asserted by SignAd therein are compulsory counterclaims under the law of the State of Texas to the state court suit previously filed by SignAd in Fort Bend County, Texas. The Fifth Circuit Court of Appeals, in effect, held that the state's compulsory counterclaim rule is not a factor to be taken into account as to whether a district court should abstain from exercising its jurisdiction. This decision by the Court of Appeals deals with an important question regarding

the abstention doctrine established by this Court and the issue has not been decided or settled by this Court. The Petition for Certiorari should be granted by this Court to decide the question of whether a federal district court can properly abstain from exercising jurisdiction where the state law requires the action filed in the federal court to be brought as a compulsory counterclaim in a previously filed state action.

Rule 97, Texas Rules of Civil Procedure, sets forth the rule regarding compulsory counterclaims. Rule 97(a) states:

> "(a) Compulsory Counterclaims.
>
> A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . ."

The elements necessary to make a counterclaim compulsory under Rule 97 are as follows: (1) the counterclaim must be within the jurisdiction of the court; (2) it must not be the subject of a pending action; (3) it must be a claim which at the time of filing the pleader has against an opposing party; (4) it must arise out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (5) it must not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. B. McElroy, *Texas Practice* § 1204 (1980).

It is a settled rule of law in Texas that a failure to assert a compulsory counterclaim precludes assertion thereof in a subsequent action. *Griffin v. Holiday Inns of America,* 496 S.W.2d 535, 539 (Tex. 1973); *Bailey v. Travis,* 622 S.W.2d 143 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.); *Gray v. Kirkland,* 550 S.W.2d 410 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

The Texas Supreme Court has held that Rule 97(a) "compels a 'pleader,' i.e., one who is already a party in the lawsuit, *to bring forward any related claims he may have against his opposition.*" *Price v. Couch,* 462 S.W.2d 556, 558 (Tex. 1970). The purpose of the rule is to prevent a multiplicity of suits and it is therefore to be liberally construed. *Booth v. Chadwick,* 154 S.W.2d 268, 272 (Tex. Civ. App.—Galveston 1941, writ ref'd).

In determining whether a claim "arises out of the transaction or occurrence" that is the subject matter of a plaintiff's claim, the courts use the "logical relationship" test. *See Revere Copper and Brass, Inc. v. Aetna Casualty and Surety Co.,* 426 F.2d 709 (5th Cir. 1970).

A "logical relationship" exists when the counterclaim arises from the same "aggregate of operative facts" in that the same operative facts serve as the basis of both claims or when the aggregate core of facts upon which the claims rests activates additional legal rights, otherwise dormant, in the defendant. *Id.* at 715.

It is clear, applying the logical relationship test to the facts in the case at hand, that the allegations of SignAd arise from the transaction or occurrence that is made the basis of the City of Sugar Land's state court suit.

As noted above, the City of Sugar Land's suit in state court concerns the very same billboard which SignAd made the basis of all of its claims in federal court. The City of Sugar Land filed suit seeking an injunction for the removal of the billboard in question and, thereafter, removed the supports and confiscated the materials which were being used to repair the billboard. SignAd in its federal court suit complained of the denial of the permit to repair this same billboard and alleged that the City of Sugar Land converted its property or took its property without just compensation by the removal of the billboard materials. Additionally, SignAd complained that a permit was either revoked or denied without due process and in violation of 42 U.S.C. Section 1983. This complaint arises from the very same aggregate core of facts or circumstances which the City of Sugar Land made the subject of its state court suit for injunction and for removal of the sign.

Because a single aggregate of operative facts (the events surrounding the attempted reconstruction of the billboard in question) gave rise to both the City of Sugar Land's and SignAd's claims, the claims of SignAd are compulsory counterclaims to be asserted in the state court suit.

Decisions in Texas courts interpreting the compulsory counterclaim rule also apply the "logical relationship" test. *Griffin v. Holiday Inns of America,* 496 S.W.2d 535 (Tex. 1973) (quantum meruit claim was a compulsory counterclaim to contractor's cross-action in previous suit alleging that subcontractor did not substantially perform the contract); *Western Inn Corporation v. Heyl,* 452 S.W.2d 752 Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.) (claims seeking enforcement of a constructive trust by rea-

son of alleged wrongful acts and violation of fiduciary duties held a compulsory counterclaim to a suit in the nature of a trespass to try title case involving the same rights and the same parties, the court stating, at page 762: "[T]he purpose of Rule 97(a) is to prevent a multiplicity of actions and to resolve in one suit all issues arising out of common and related matters. . . ."); *Flato Brothers, Inc. v. Builders Loan Company of Dallas,* 457 S.W.2d 154 (Tex. Civ. App.—Dallas 1970, no writ) (Suit for damages for alleged wrongful foreclosure or for vacation of a foreclosure sale held compulsory counterclaims to suit for deficiency judgment following a foreclosure of a deed of trust).

It has been held that a federal court is effectively precluded from exercising jurisdiction in a case where a compulsory counterclaim in a pending state action was not asserted. *Peterson v. United Accounts, Inc.,* 638 F.2d 1134, 1136 (8th Cir. 1981) (case held that no compulsory counterclaim under North Dakota law existed, however the court stated that if the counterclaim was characterized as compulsory, this would effectively preclude federal jurisdiction).

In addition, causes of action in federal courts have been stayed or enjoined where, in another pending federal court action, a compulsory counterclaim which formed the basis of the stayed or enjoined suit was not asserted. *Columbia Plaza Corp. v. Security National Bank,* 525 F.2d 620 (D.C. Cir. 1975); *Donnkenny, Inc. v. Nadler,* 544 F. Supp. 166 (S.D.N.Y. 1982). *See also* Wright & Miller, *Federal Practice and Procedure,* Section 1418 ("[i]deally, once a court becomes aware that an action or its docket involves a claim that should be a compul-

sory counterclaim in another pending federal suit, it will stay its own proceedings or will dismiss the claim with leave to plead it in the prior action.").

The decision of the Fifth Circuit Court of Appeals conflicts with the decisions cited above regarding state compulsory counterclaim rules. In addition, this Court has not decided the important question under the *Colorado River* abstention doctrine as to whether a district court may abstain in a case where the federal action brought is a compulsory counterclaim under the state law to a previously filed state court action.

For these reasons, the Petition for Writ of Certiorari filed by these Petitioners should be granted by this Honorable Court.

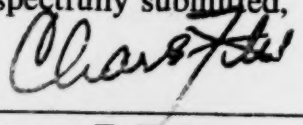
## CONCLUSION

This Honorable Court should grant the Petition for Writ of Certiorari filed by these Petitioners on the grounds that the United States Court of Appeals for the Fifth Circuit incorrectly applied the abstention doctrine to the facts of this case and because the decision of the United States Court of Appeals for the Fifth Circuit conflicts with other decisions of other Federal Courts of Appeals and because this Honorable Court has not settled the question of whether a district court should abstain in a case where the federal court cause of action is a compulsory counterclaim under state law to a previously filed state court suit.

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that the Petition for Writ of Certiorari be, in all

things granted, and for such other and further relief to which Petitioners may be justly entitled.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

The undersigned, Charles E. Fitch, Counsel of Record for Petitioners in the above entitled and numbered cause, and a member of this Court, hereby certifies that three (3) copies of the above and foregoing Petition for Writ of Certiorari have been served on each party in this proceeding required to be served, by depositing the same in a United States mail box, with first class postage prepaid, addressed to counsel of record as follows:

Mr. Richard Rothfelder
Ryan & Shoss
1331 Lamar, Suite 1560
Houston, Texas 77010

on this 30th day of May, 1985.

Charles Fitch

CHARLES E. FITCH

## APPENDIX A

SIGNAD, INC., Plaintiff-Appellant,

v.

CITY OF SUGAR LAND and Walter Wolf,
Defendants-Appellees.

No. 84-2515

Summary Calendar.

United States Court of Appeals,
Fifth Circuit

Feb. 28, 1985.

City filed suit in state court against owner of billboard seeking to permanently enjoin use of billboard allegedly not conforming with city ordinance. Before seeking injunctive relief, city had confiscated billboard. Owner of billboard subsequently filed suit in federal court, asserting claims of conversion and taking without just compensation. The United States District Court for the Southern District of Texas, Robert O'Conor, J., dismissed the suit without prejudice, and billboard owner appealed. The Court of Appeals, Reavley, Circuit Judge, held that abstention on ground of parallel state court litigation was improper, considering that federal forum was not inconvenient, that suit involved a section 1983 claim, and that discovery was at a more advanced stage in the federal than in the state litigation.

Reversed and remanded.

Ryan & Shoss, Richard L. Rothfelder, William Van Fleet, Houston, Texas, for plaintiff-appellant.

DeLange, Hudspeth, Pitman & Katz, Charles E. Fitch, Ben A. Baring, Jr., Houston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before REAVLEY, POLITZ and HIGGINBOTHAM, Circuit Judges.

REAVLEY, Circuit Judge:

On this appeal we review the trial court's dismissal on abstention grounds of a suit brought under 42 U.S.C. § 1983 (1982). Holding that the trial court's dismissal without prejudice was an abuse of discretion, we reverse and remand to the district court so that appellant may present its federal claims for complete resolution before a federal court.

*Background*

The City of Sugar Land filed suit in state court against SignAd, Inc., seeking to permanently enjoin the latter's use of a billboard allegedly not conforming with a city ordinance. Before seeking this injunctive relief, however, the City had confiscated the billboard.

About one month after the state action was begun, SignAd filed suit in federal district court pursuant to 42 U.S.C. § 1983 (1982), asserting claims of conversion and taking without just compensation. The trial court dismissed without prejudice SignAd's suit in an order with no accompanying memorandum, apparently basing its order on grounds of abstention.

*Discussion*

[1] This case presents us with a question of what is known as the "fourth type" of abstention, in which a federal court must decide whether to exercise jurisdiction when there are parallel state court proceedings. *See* 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4247 (1978 & Supp. 1984). Although the doctrine is given the name abstention, in practice the federal courts in this context are anything but abstentious. When parallel state and federal litigation exists, the federal court's "balance [is] heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 16, 103 S.Ct. 927, 937, 74 L.Ed.2d 765, 780 (1983).

The Supreme Court first recognized this fourth type of abstention in *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed. 2d 483 (1976). In that case, the Court expressed the view that, while a federal court generally may not decline to exercise its jurisdiction because of parallel state litigation, exceptional circumstances may exist to warrant abstention. *Id.* at 819, 96 S.Ct. at 1246, 47 L.Ed.2d at 499. It has refined the doctrine most recently in *Moses,* 460 U.S. at 15-27, 103 S.Ct. at 937-43, 74 L.Ed.2d at 779-87. In that case, the Court stated:

> When a district court decides to dismiss or stay under *Colorado River,* it presumably concludes that the parallel state-court litigation will be an adequate vehicle for the complete resolution of the issues between the parties. If there is any substantial doubt as to this, it would be a serious abuse of discretion to grant the stay or dismissal at all.

460 U.S. at 28, 103 S.Ct. at 943, 74 L.Ed.2d at 787. We see no exceptional circumstances that should require Signad to litigate its claim in the state court proceeding.

[2] Of course, the *Pullman*[1]-type abstention is commonplace with section 1983 claims. *See, e.g., Stephens v. Bowie County,* 724 F.2d 434 (5th Cir. 1984); *Brooks v. Walker County Hospital District,* 688 F.2d 334 (5th Cir. 1982), *cert. denied,*____U.S.____, 103 S.Ct. 2452, 77 L.Ed.2d 1332 (1983); *Ibarra v. Bexar County Hospital District,* 624 F.2d 44 (5th Cir. 1980). We find no decision by this court in which a *Colorado River* abstention was considered in the context of section 1983. We must agree with the Ninth Circuit's statement that the "unflagging obligation"[2] of the federal courts to exercise the jurisdiction given them "is particularly weighty when those seeking a hearing in federal court are asserting . . . their right to relief under 42 U.S.C. § 1983." *Tovar v. Billmeyer,* 609 F.2d 1291, 1293 (9th Cir. 1980); *see Canton v. Spokane School District No. 81,* 498 F.2d 840, 845-46 (9th Cir. 1974).

[3] In *Colorado River,* 424 U.S. at 818-19, 96 S.Ct. at 1246-47, 47 L.Ed.2d at 498-99, the Court identified three factors to be considered in assessing the appropriateness of abstention in *in personam* cases: (a) the inconvenience of the federal forum; (b) the desirability of avoiding piecemeal litigation; and (c) the order in which jurisdiction was obtained by the concurrent forums. None of these factors militates against the exercise of jurisdiction in this case. As to the first factor, Signad argues that Houston, the situs of the federal litigation, and Richmond, of the state claim, are equidistant from Sugar Land, where the dispute arose. In rebuttal, the City points out

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1. *Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

2. *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 818, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976).

that Sugar Land is 18 miles from Houston and 9.5 miles from Richmond. We reaffirm the memorable adage, *de minimis non curat lex.*

On the issue of piecemeal litigation, we adopt the Ninth Circuit's view that "piecemeal litigation and some duplication of judicial effort is the unavoidable price of preserving access to the federal relief which section 1983 assures." *Tovar v. Billmeyer,* 609 F.2d 1291, 1293 (1980).

Finally, with regard to the question of priority in the concurrent forums, we take cognizance of the Supreme Court's recent teaching that this element "is to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand. Thus, priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 21, 103 S.Ct. 927, 940, 74 L.Ed.2d 765 (1983). It is undisputed that discovery was at a more advanced stage in the federal than in the state litigation.

Application of the test enunciated in *Colorado River,* then, leads us to conclude that abstention was improper here. Our decision is all the more compelling inasmuch as this is a section 1983 claim in which *Colorado River* abstention is urged; and we see none of the exceptional circumstances[3] justifying abstention.

REVERSED AND REMANDED.

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3. *See Colorado River,* 424 U.S. at 818, 96 S.Ct. at 1246, 47 L.Ed.2d at 498; *cf. Kruse v. Snowshoe Co.,* 715 F.2d 120, 123-24 (4th Cir. 1983) (no exceptional circumstances justifying *Colorado River* abstention in non-§ 1983 case), *cert. denied,* ____U.S.____, 104 S.Ct. 1413, 79 L.Ed.2d 739 (1984).

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-84-1765

SIGNAD, INC.,
Plaintiff

v.

CITY OF SUGAR LAND
AND WALTER WOLF,
Defendants

(Filed August 16, 1984)

### ORDER

On the date hereinafter stated came on to be heard the Motion of Defendants, City of Sugar Land and Walter Wolf to abate, or in the alternative, to dismiss the cause of action currently pending before this Court, and the Court having read said Motion and the Memorandum of Arguments and Authorities in support thereof, and having considered said Motion and Memorandum in support thereof, and being of the opinion that said Motion should be granted; it is therefore

ORDERED, that the Motion of Defendants City of Sugar Land and Walter Wolf be GRANTED and it is further

ORDERED that the above entitled cause of action be, and the same is hereby DISMISSED without prejudice to the refiling of the same.

SIGNED this 16th day of August, 1984.

/s/ ROBERT O'CONOR, JR.
Judge Presiding

## APPENDIX C

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

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No. 84-2515

D. C. Docket No. H-84-1765

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SIGNAD, INC.,
Plaintiff-Appellant,

versus

CITY OF SUGAR LAND
and WALTER WOLF
Defendants-Appellees.

---

Appeal from the United States District Court
for the Southern District of Texas

---

Before REAVLEY, POLITZ, and HIGGINBOTHAM, Circuit Judges.

### JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 34;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and

the same is hereby, reversed, and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

February 28, 1985

ISSUED AS MANDATE:

OP-JDT-10

## APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 84-2515

---

SIGNAD, INC.,
Plaintiff-Appellant,

versus

CITY OF SUGAR LAND
and WALTER WOLF,
Defendants-Appellees.

---

Appeal from the United States District Court
for the Southern District of Texas

---

ON PETITION FOR REHEARING

(April 10, 1985)

Before REAVLEY, POLITZ and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ THOMAS M. REAVLEY
United States Circuit Judge